

Exhibit 6L - Hearing Transcript on Ricks

1 UNITED STATES BANKRUPTCY COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 IN RE: . Case No. 2:13-53846-tjt
5 CITY OF DETROIT, MICHIGAN, . Chapter 9
6 Debtor. .
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10 **TRANSCRIPT OF HEARING ON CITY OF DETROIT'S MOTION FOR ENTRY**
11 **OF AN ORDER ENFORCING THE BAR DATE ORDER AND CONFIRMATION**
12 **ORDER AGAINST DESMOND RICKS**

13
14 BEFORE THE HONORABLE THOMAS J. TUCKER
15 UNITED STATES BANKRUPTCY JUDGE

16 WEDNESDAY, MARCH 20, 2019
17 DETROIT, MICHIGAN
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25 Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 (Time Noted: 1:34 p.m.)

2 THE COURT CLERK: Please rise. This Court is back
3 in session.

4 You may be seated.

5 Court will call the matter of the City of Detroit,
6 Michigan, case number 13-53846.

7 THE COURT: All right. Good afternoon to each of
8 you. Would you enter your appearances for the record,
9 please, starting with counsel for the City?

10 MR. SWANSON: Thank you, Your Honor. Marc Swanson
11 on behalf of the City of Detroit.

12 MR. HARRINGTON: Good afternoon, Your Honor.
13 James J. Harrington on behalf of the Plaintiffs Ricks.

14 THE COURT: All right. Good afternoon again,
15 everyone. This is the hearing, as you know, on the City of
16 Detroit's motion seeking relief against Desmond Ricks et al.,
17 motion for entry of an order enforcing the bar date order and
18 confirmation order, et cetera.

19 I have reviewed the papers filed by the parties
20 regarding this -- relating to this motion. I have also done
21 some review of the record of the U.S. District Court in the
22 lawsuit that's pending over in District Court, which is
23 referred to and discussed in the motion and related papers.

24 So, Mr. Swanson, let me hear from you first.

25 MR. SWANSON: Good afternoon. Plaintiff Desmond

1 Ricks is suing the City on account of a claim which arises
2 from alleged unlawful events in 1992, and an alleged unlawful
3 conviction in 1992. The claims against the City are, in
4 Plaintiff's own words, based on the City's alleged policies
5 that were in effect, quote, "In and before March 5, 1992."
6 Reading from paragraph 81 of the complaint.

7 The claim is further based on alleged unlawful and
8 unconstitutional actions taken by the City's police officers
9 in 1992. It's undisputed that the alleged unlawful
10 conviction was in 1992, the actions by the City's police
11 officers were in 1992, and the City's alleged unlawful
12 policies were those in place in 1992, and the City didn't
13 file for bankruptcy until 2013, 21 years later. Yet,
14 Plaintiff claims that its claim is not barred by the City's
15 bankruptcy case and didn't arise until 2017.

16 And why does Plaintiff make this assertion? Well,
17 Plaintiff asserts that the proper test for the Court to
18 determine when the claim arose is the right to payment test.
19 That is the leading argument on page 1 of the Plaintiff's
20 objection to the City's motion.

21 As this Court knows, and as this Court has wrote
22 about, that test holds that a bankruptcy claim does not
23 accrue until the cause of action is ripe under non-
24 bankruptcy law. So under applicable federal law or
25 applicable state law.

1 This Court, however, rejected that test in an
2 opinion that's cited in the City's reply filed on Friday.
3 And instead of the right to payment test, the Court adopted
4 the fair contemplation test.

5 And under that test, a claim is considered to have
6 arisen pre-petition if the creditor could have ascertained
7 through the exercise of reasonable due diligence that it had
8 a claim at the time the petition is filed.

9 And as this Court wrote, this test allows the
10 Court to examine all the circumstances surrounding a
11 particular claim: The Debtor's conduct, the parties' pre-
12 petition relationship, the parties' knowledge, the elements
13 of the underlying claim, and use its best judgment to
14 determine what is fair to the parties in context.

15 Now, attached as exhibit 17 to the City's reply
16 was a very recent District Court decision in the case *Sanford*
17 *v. City of Detroit*. That case has many factual similarities
18 to the case here today. It's an alleged unlawful conviction
19 case. The alleged unlawful conviction occurred before the
20 City filed for bankruptcy. The conviction was not overturned
21 until after the City exited from bankruptcy.

22 And the plaintiff in that case, Sanford, asserted
23 that the City's alleged customs, policies, and practices,
24 resulted in his unlawful conviction. And that's the same
25 type of claim that the Plaintiff here is making against the

1 City.

2 And *Sanford* advanced the exact same argument that
3 the Plaintiff here is making to support its argument that the
4 claim is not subject to the Plan. And that's the argument
5 that the pre-petition conviction was not overturned until
6 after the City exited bankruptcy, and, thus, the cause of
7 action was not ripe under non-bankruptcy law until after the
8 City exited bankruptcy, and, thus, it was not subject to the
9 City's Plan.

10 The Federal District Court rejected that argument,
11 and stating that Mr. Sanford certainly contemplated the
12 factual bases underlying the claims raised in his complaint
13 since he attempted repeatedly to argue actual innocence
14 before the State Court since at least 2008, insisting that
15 his confessions were falsely obtained, concocted, and
16 coerced.

17 *Sanford* correctly points out that he could not
18 have sued the City until his convictions were set aside,
19 which did not happen until after the bankruptcy.

20 But the courts that have considered the question
21 uniformly have concluded that claims based on pre-petition
22 malicious prosecutions were barred, notwithstanding that the
23 Plaintiff could not file suit on his claims until his
24 criminal conviction was overturned. The case is on all fours
25 with the facts here.

1 And despite this Court's adoption of the fair
2 contemplation --

3 THE COURT: There's actually an even more recent
4 case from the District Court similar to this case and similar
5 to *Sanford*, which maybe you're familiar with. I happened to
6 cross it recently. It was decided March 6, 2019. It's
7 called *Monson*, M-O-N-S-O-N, *versus City of Detroit, et al.*
8 It's 2019 Westlaw 1057306, 1057306.

9 MR. SWANSON: Wow.

10 THE COURT: A decision by Judge Michelson, very
11 similar to *Sanford*, and same result as *Sanford*. I happened
12 to cross it when I was looking for something else.

13 And so there's two District Judges in two
14 different cases, the District Court for this District, that
15 have ruled the way you've described as characterized as
16 *Sanford* and as you want the Court to rule in this matter.

17 And so I want to make both parties aware of that
18 case, that *Monson* case. Were you aware of that?

19 MR. SWANSON: I had run across it, Your Honor.

20 THE COURT: Okay. Well, so those are two cases
21 where the City defended an action brought against it in
22 District Court and raised the argument that you're raising in
23 this Court now on this motion in the District Court as a
24 defense and let the District Court decide the issue.

25 Why didn't the City let the District Court -- or

1 why isn't the City leaving it to the District Court in this
2 case, in the Ricks case, to decide the issues raised by this
3 motion?

4 MR. SWANSON: Your Honor, I apologize. I don't
5 have a great answer for you. I was told by the City that
6 this claim had been asserted in the District Court and to
7 file a motion with you. I never had any discussion about
8 filing a motion in the --

9 THE COURT: Well, let me ask you this: Do you
10 know why the City waited until January 30, 2019, to file this
11 motion in this Court when the case, the District Court case
12 against it by the Ricks, the Ricks parties, was filed back in
13 August 2017? A year and a half or so, the City waited to
14 seek relief from this Court. Do you know why that is?

15 MR. SWANSON: I don't know why that is.

16 THE COURT: The City, I noticed in looking at the
17 District Court record, the pending case, the Ricks case in
18 the District Court, the City filed a motion for summary --
19 the City and all Defendants filed a motion for summary
20 judgment in that case. I'm sure you're familiar, as is your
21 opposing counsel, with that.

22 And in that motion -- and that was that, that was
23 filed on -- the City's motion was filed on February 6th, and
24 it raised a whole bunch of arguments, but one of the
25 arguments it raised was, the City of Detroit raised the same

1 argument that you're making in this current motion in its
2 summary judgment motion filed in the District Court.

3 And I did see that, and I did see the response to
4 that that was filed on March 6, 2019, by the Plaintiffs, the
5 Ricks plaintiffs, to that motion.

6 Now, in that response, the Ricks Plaintiffs argue
7 the fair contemplation test and they argue that they should
8 prevail on that fair contemplation test. They make their
9 arguments there, and that's in a brief that they filed on
10 March 6, 2019, docket number 99 in the District Court case,
11 case number 17-12784.

12 So they made that argument about the fair
13 contemplation test on March 6th. And that, of course, was
14 before your reply brief was filed in this case pointing out
15 the fair contemplation test, so forth, on March 15.

16 So we've got this issue, or these issues, being
17 raised simultaneously, essentially, in both cases, this
18 bankruptcy case and the District Court case. Why shouldn't I
19 leave it to the District Court to decide this issue, as was
20 done in the *Monson* case and in the *Sanford* case, as those
21 Courts decided?

22 MR. SWANSON: Well, Your Honor, this Court has, of
23 course, jurisdiction over the Plan, can enforce the Plan, has
24 jurisdiction over the bar date order, and the City's moving
25 and asking for relief in this Court. I don't -- I don't --

1 THE COURT: Now, the District Court is aware that
2 you are doing this, I see from the District Court papers. I
3 saw there was a motion for extension of time, and the
4 District Court recently denied that motion.

5 And then in the course of that motion, and the
6 papers filed in that motion, and the District Court's ruling
7 on that motion, it's clear the District Court is aware the
8 City is making this same argument in this case, in this
9 bankruptcy case. And just didn't really say that this Court
10 shouldn't do that or, should or shouldn't do that, but just
11 basically noted it.

12 So it's just, you know, perhaps the City had a
13 deadline, I assume they had a deadline to file any summary
14 judgment motion in the Ricks case in District Court that they
15 had to meet, and I can understand that.

16 And when you file a motion for summary judgment,
17 you want to put in all your arguments. But by the time the
18 City filed its summary judgment motion in the District Court
19 case, you had already made the motion in this case.

20 MR. SWANSON: Yeah. And I checked before I came
21 here today. I believe the deadline for the City to file its
22 summary judgment motion in the District Court case was
23 February 6th, and I believe that it filed its motion --

24 THE COURT: And you filed it on the deadline?

25 MR. SWANSON: Not me.

1 THE COURT: Yeah.

2 MR. SWANSON: Yeah.

3 THE COURT: Right. The City Law Department.

4 MR. SWANSON: City Law Department filed it on
5 February 6th. And I saw that motion. I saw -- I did check
6 the docket last week. I saw that it had not been ruled on by
7 the District Court. I wasn't aware that the City --

8 THE COURT: It looks like there's a deadline --
9 the briefing isn't done yet. I think there's a deadline of
10 March 27th for reply briefs to be filed in connection with
11 those motions --

12 MR. SWANSON: Sure.

13 THE COURT: -- in the District Court. So it will
14 be sometime after that, presumably, before the District Court
15 makes any ruling on those motions.

16 But you want this court to go ahead and rule,
17 presumably, now, today, on your motion, and in your favor, as
18 a means, in your view, of what would shortcut and make
19 necessary the District Court ruling on this issue in the
20 District Court case.

21 MR. SWANSON: Yes, Your Honor.

22 THE COURT: Are there other cases like this
23 floating around out there in District Court where this same
24 issue is at play?

25 MR. SWANSON: Not that I'm aware of.

1 THE COURT: Okay. Well, so perhaps you saw and
2 reviewed the summary judgment brief filed by the Ricks
3 Plaintiffs in the District Court. That is the brief in which
4 they filed on March 6th in which they argued fair
5 contemplation. That is that Ricks' claim was not within his
6 fair contemplation at the time the bankruptcy petition was
7 filed in the City's bankruptcy case. Did you read that
8 brief?

9 MR. SWANSON: I may have glanced at it, but I
10 don't --

11 THE COURT: Okay.

12 MR. SWANSON: I did not look at it in any detail.

13 THE COURT: Well, it's only a couple --

14 MR. SWANSON: Yeah.

15 THE COURT: It's a couple pages long.

16 MR. SWANSON: Yeah.

17 THE COURT: But we'll hear, presumably, the same
18 kind of arguments, the same arguments, and maybe other
19 arguments, here from Mr. Harrington on that subject.

20 But, you know, in your opening motion and in the
21 response filed by the Ricks Plaintiffs to your motion, nobody
22 argues anything about the fair contemplation test. Nobody
23 says a word about it. It only gets discussed, you know,
24 application of it and what the test means and requires and
25 everything else, in your reply, right? In this case.

1 MR. SWANSON: That's true.

2 THE COURT: Okay. So my only clue at the moment
3 about what the Ricks Plaintiffs are going to argue about fair
4 contemplation is in what they filed in the District Court
5 case that I've just alluded to.

6 So I did read your reply brief, of course, and I
7 looked at the exhibits you attached to that in support of
8 your argument that Mr. Ricks was claiming innocence and
9 claiming all the facts that he needed to know as claims of
10 innocence and wrongful imprisonment and everything else long
11 before the City filed its bankruptcy petition in 2013. I did
12 review those exhibits.

13 Do you want to say anything about those things or
14 that subject further before we hear from Mr. Harrington?

15 MR. SWANSON: Yes, Your Honor. I'd like to go
16 through the exhibits, because I think they certainly go to
17 Mr. Ricks fairly contemplating that he had a claim against
18 the City prior to the City's bankruptcy filing.

19 The first exhibit here is a deposition transcript
20 from Mr. Ricks on May 21, 2018. The portions that were
21 excerpted from the deposition, however, talk about events in
22 Mr. Ricks' own words which occurred in 2009. So Mr. Ricks
23 describes in 2009 that he saw -- this is in Exhibit 1. He
24 saw an ad in the Bar Journal with the name of the expert
25 witness he used on the ballistic issue in 2009. A gentleman

1 by the name of David G. Townsend. And the ad is at Page 32
2 of 108 at Docket 13021.

3 And Mr. Ricks describes in 2009 his efforts to
4 contact Mr. Townsend because he believed that he had been
5 wrongfully convicted and he believed that the ballistics test
6 was a factor in that wrongful conviction.

7 The next exhibit, Your Honor, is a letter from the
8 state appellate defender officer dated August 6th, 2009. And
9 they write to Mr. Ricks --

10 THE COURT: That's exhibit 2, right?

11 MR. SWANSON: That's exhibit 2.

12 THE COURT: Yeah.

13 MR. SWANSON: I write in response to your letters
14 regarding the Detroit Crime Lab. The State Appellate
15 Defender Office is undertaking a complete review of our Wayne
16 County clients to determine whether tainted evidence from the
17 Detroit Crime Lab resulted in your -- resulted in conviction.

18 Again, it would certainly appear here Mr. Ricks
19 had made a claim to the State Appellate Defender Officer --
20 Office that a tainted crime lab played a -- played a role in
21 his conviction.

22 Exhibit number 3, Your Honor, is another letter
23 dated February 11, 2010 from the same sender, the State
24 Appellate Defender Office, which writes to Mr. Ricks: "You
25 have expressed interest in having our office review your case

1 for potential Detroit Crime Lab issues." Again, Mr. Ricks is
2 asserting that some malfeasance with the Detroit Crime Lab
3 resulted in his conviction.

4 Exhibit 4, Your Honor, dovetails with Exhibit 1.
5 This is a letter from David Townsend, the expert Mr. Ricks
6 used in his 1992 trial and ultimate conviction, writing to
7 Mr. Ricks that he was going to the prison to try to visit Mr.
8 Ricks but couldn't get there.

9 Exhibit 5, Your Honor, is a email dated June 22,
10 2011 and June 23, 2011. The bottom email is from a lady
11 named Claudia Whitman, and Ms. Whitman was a investigator who
12 was working on Mr. Ricks' behalf. Her official title, I
13 believe, is Director of National Capital Crime Assistance
14 Network, and she is writing here to a U.S. attorney about
15 contacting the University of Michigan Innocence Clinic to
16 work on Mr. Ricks' claim. And this is in 2011.

17 Exhibit 6 is correspondence between the lady, Ms.
18 Whitman, that I just identified, and another man named
19 Roberto Guzman, who is a Senior Legal Assistant at the
20 People's Task Force to Free the Wrongfully Convicted, again
21 another individual that was working on Mr. Ricks' case,
22 talking about sending him, to Mr. Ricks, a letter regarding
23 some ballistic testing to the prison where Mr. Ricks was
24 incarcerated and that material not getting through to Mr.
25 Ricks.

1 Exhibit 7, again, some correspondence between Mr.
2 Guzman, the assistant at the People Task Force to Free the
3 Wrongfully Convicted, and Claudia Whitman, the investigator,
4 discussing efforts to contact some of the original agents who
5 made Mr. Ricks' arrest in 1992.

6 Exhibit 8 is a letter dated February 1, 2012, from
7 Mr. Ricks to the Bureau of Alcohol, Tobacco, and Firearm. He
8 states quite clearly in the second paragraph on Page 1: "I
9 have been incarcerated for the past 20 years for a crime that
10 I did not commit, but recently, I've been blessed to have the
11 assistance of Ms. Claudia Whitman. She is the Director of
12 NDRAN of Cure ND -- NDRAN of Cure, which is a national
13 organization that reaches out to aid and assist the
14 wrongfully convicted."

15 And this is a letter where he essentially requests
16 that the Bureau provide him with access to the agents that
17 arrested him.

18 Page 2 of that letter also talks about Mr. Ricks,
19 in the middle there, having an affidavit from the independent
20 firearms examiner, David G. Townsend, the individual
21 identified in exhibit 1 and exhibit 4, in which he says that
22 the two slugs that he was given to test did not have any
23 blood or other trace evidence.

24 At the end of the letter he has a PS there which
25 says: "I wrote to the United States Attorney, Barbara L.

1 McQuaid, and she directed me to you."

2 Exhibit 9 is that letter to Ms. McQuaid, or is one
3 of the letters to Ms. McQuaid, and this is written, again,
4 June 13th, 2012, a year before the City filed for bankruptcy,
5 written by David Moran, who I believe was a lawyer at the
6 Michigan Innocence Clinic, and Sally Larson, a student
7 attorney at the University of Michigan Innocence Clinic. So
8 at that time Mr. Ricks had the University of Michigan
9 Innocence Clinic working on his behalf trying to overturn his
10 alleged unlawful conviction.

11 Exhibit 10 --

12 THE COURT: This letter says in the first
13 paragraph: "We do not represent Mr. Ricks," --

14 MR. SWANSON: Oh. Right.

15 THE COURT: -- "but are investigating his claims
16 of innocence," et cetera. So I'm not sure what that means
17 exactly, if they were investigating claims of innocence of
18 Mr. Ricks on his behalf. I don't know why they said they
19 weren't representing him, but they were investigating his
20 claim.

21 MR. SWANSON: Yes.

22 THE COURT: Okay.

23 MR. SWANSON: And I think the complaint makes a
24 reference to the Michigan Innocent Clinic playing a critical
25 role in his, in his -- in overturning his conviction.

1 So to the extent they were representing him, they
2 were certainly working on his behalf, to the extent there is
3 a difference, I suppose.

4 Exhibit 10 is a letter from the Michigan Innocence
5 Clinic. This is six days after they wrote to Ms. McQuaid,
6 June 19, 2012, and this is to the City of Detroit Law
7 Department FOIA coordinator requesting, you know, it's a FOIA
8 request for information related to the homicide that he was
9 convicted of.

10 Exhibit 11, more emails between Sally Larson, who
11 was the student attorney who signed the letter to Ms.
12 McQuaid on behalf of the Michigan Innocence Clinic, to
13 Claudia Whitman, the investigator. And in this letter the
14 parties are discussing the possibility of rerunning
15 ballistics from the 1992 conviction.

16 Exhibit 12, I believe, is similar.

17 Exhibit 13, another letter dated September 24,
18 2012, again, from Mr. Ricks to Ms. Larson, the student
19 attorney at the University of Michigan Law School and
20 Michigan Innocence Clinic, talking about new case law which I
21 believe Mr. Ricks asserts could or would help in overturning
22 his unlawful conviction.

23 Exhibit 14, these are emails between the Michigan
24 Innocence Clinic, again Ms. Sally Larson and Ms. Claudia
25 Whitman, regarding their notes on discussion of, you know,

1 ballistics experts.

2 Exhibit 15 --

3 THE COURT: I noticed that exhibit 14 has as part
4 of it a copy of notes that Ms. Larson made of the phone
5 conversation that she had with David Townsend on October 2,
6 2012, where they're talking about the ballistics evidence and
7 problems with it, and so forth.

8 MR. SWANSON: Yeah, in the Detroit Crime Lab.

9 THE COURT: Go ahead.

10 MR. SWANSON: Thank you.

11 Exhibit 15, is another set of emails between the
12 Michigan Innocence Clinic and Claudia Whitman, again talking
13 about ballistics and the bullets and, you know, that same
14 subject matter.

15 Exhibit 16 is a letter from Mr. Ricks dated
16 December 12, 2012, where one of the alleged witnesses in the
17 Plaintiff's complaint, named in the Plaintiff's complaint,
18 Ms. Strong, where he's writing to her, again discussing the
19 case and potential misidentification of him by Ms. Strong.

20 And so -- and this is -- this is -- there's more
21 that's similar to this. We only attached --

22 THE COURT: I noticed in that letter, exhibit 16,
23 the letter from Mr. Ricks to Ms. Strong, he does complain
24 about the police, and he refers to what the police did to me,
25 and he's angry and frustrated about what the police did to

1 me. And he says -- he talks about the Detroit Crime Lab was
2 closed down in 2008 for doing bad testing on evidence, such
3 as guns and bullets. I'm hoping that they will retest the
4 evidence in my case, and so forth.

5 The next -- the last page of his letter he says:
6 "The police have been running wild in Detroit doing all sorts
7 of corrupt and unethical things to lock people up. Whether
8 innocent or not, they don't care." That's the last page of
9 the exhibit 16 letter to Mr. Ricks to Ms. Strong.

10 Anyway, go on.

11 MR. SWANSON: Well, Your Honor, I believe going
12 through those 16 exhibits we have conclusive evidence that
13 the claims Mr. Ricks is asserting in his complaint against
14 the City were within his fair contemplation well before the
15 City filed for bankruptcy.

16 When this Court applies the fair contemplation
17 contest it looks at a number of things:

18 The debtor's conduct. The debtor's conduct here
19 all occurred in 1992.

20 The relationship between the parties is another
21 factor that the Court looks at. The relationship between the
22 parties all occurred in 1992.

23 The Court also looks at the parties' knowledge.
24 Well, here, Mr. Ricks, he's demonstrated that he knew of this
25 potential claim probably from the minute that he alleges he

1 was unlawfully arrested, and certainly well before the City's
2 bankruptcy case, because the Michigan Innocence Clinic was
3 investigating this on his behalf. He was contacting experts.
4 He was contacting witnesses. All the while professing his
5 innocence and professing that issues with the Detroit Police
6 Department and Detroit Crime Lab led to his unlawful
7 conviction.

8 And, Your Honor, these are the same claims and
9 facts that formed the basis for Mr. Ricks' complaint against
10 the City of Detroit. And sure, Your Honor, all of the
11 factors --

12 Oh, I guess, finally, this is a *Monell* claim that
13 the Plaintiff here is asserting against the City of Detroit,
14 and *Monell* holds municipalities may be held liable for the
15 constitutional violations of their employees only where the
16 municipality's policy or custom led to the violation, and
17 there can be no liability under *Monell* without an underlying
18 constitutional violation.

19 All of the constitutional violations that Mr.
20 Ricks is complaining about occurred in 1992, 21 years before
21 the City filed for bankruptcy.

22 And as exhibits 1 to 16 demonstrate, Mr. Ricks
23 knew of the factual bases, or at least was asserting the
24 factual bases for these alleged constitutional violations
25 well before the City filed for bankruptcy.

1 In short, Your Honor, all of the factors
2 considered under the fair contemplation test demonstrate that
3 the claims that were asserted by Ricks against the City arose
4 no later than 1992, and, thus, were subject to the discharge
5 in the City's Plan and the bar date order.

6 The City would thus respectfully request that this
7 Court enter an order dismissing the City of Detroit with
8 prejudice from the Federal District Court lawsuit asking the
9 Plaintiff -- requiring the Plaintiff to dismiss the City of
10 Detroit with prejudice from the lawsuit.

11 THE COURT: With respect to the *Monell*, what you
12 characterize as the *Monell* claims, the claims against the
13 City that are asserted in the U.S. District Court complaint,
14 first amended complaint, I know accrual -- the accrual test
15 is not the test here, and I understand that. I've written
16 about that, as you know, in the published opinion that you
17 cite in your brief.

18 But in terms of when a claim, a *Monell* claim
19 accrues in this kind of situation, is it correct to say that
20 in the case of someone wrongfully imprisoned, wrongfully
21 convicted, wrongfully imprisoned, because of violations of
22 that person's constitutional rights by police is the sort of
23 the theory that's alleged here, and then seeking liability
24 against the municipality because of its policies and
25 practices and so forth, does that claim only accrue when

1 there has been a reversal, vacation, dismissal of the
2 charges, conviction against the claimant? I'm talking about
3 accrual here not -- accrual under non-bankruptcy law, not
4 when it arises for purposes of it being a bankruptcy claim.
5 Is that the case?

6 MR. SWANSON: Your Honor, I have not researched
7 that. I know that in the opinion that we cited, the *Sanford*
8 opinion, the District Court there, I believe, said that
9 *Sanford* correctly points out that he could not have sued the
10 City until his convictions were set aside, which did not
11 happen until after bankruptcy.

12 THE COURT: All right. I see. So that's the
13 answer that the Court in the *Sanford* case gives to that.

14 MR. SWANSON: Yeah. And I have nothing to add to
15 that to support it or deny it.

16 THE COURT: All right. Anything else you'd like
17 to say?

18 MR. SWANSON: No, Your Honor.

19 THE COURT: All right. Thank you.

20 Mr. Harrington?

21 MR. HARRINGTON: Yes, Your Honor. Thank you.

22 If I may speak briefly on the accrual as you were
23 asking in the non-bankruptcy setting?

24 THE COURT: Sure.

25 MR. HARRINGTON: Yes, Your Honor, you are correct

1 in the sense that the claim has not accrued until the
2 conviction has been set aside.

3 I mean, think about the practical ramifications if
4 say somebody like Mr. Ricks was to have filed his 1983 *Monell*
5 claim in 1990, 1995, the first thing that's going to be met
6 with is a simple 12(b)(6) motion. I mean, there's --

7 THE COURT: Well, you cite the *Heck* case --

8 MR. HARRINGTON: Yes, we do.

9 THE COURT: -- in your response to the City's
10 motion in this case. Is it the *Heck* case, that Supreme Court
11 case, that stands for this proposition that a *Monell* type
12 claim in this kind of a situation, wrongful imprisonment,
13 wrongful conviction, does not arise until the conviction is
14 set aside?

15 MR. HARRINGTON: That is accurate, Your Honor.

16 THE COURT: It is. Okay.

17 MR. HARRINGTON: Now --

18 THE COURT: It doesn't sound like the City
19 disputes that, really, so. All right.

20 MR. HARRINGTON: I don't think they do, because
21 it's -- I think you're just getting a little bit of context
22 because this is bankruptcy and that's -- what we're talking
23 about is non-bankruptcy with the accrual of the claim.

24 But it kind of dovetails and tailors into what
25 we're talking about here with the fair contemplation, because

1 as counsel was walking through all of these exhibits talking
2 about what Mr. Ricks was doing in contacting and really
3 professing his innocence, all he's doing is trying to build a
4 case.

5 And I think that is a distinction, that he's
6 trying to build a case, as opposed to being able, really, to
7 file a case. And what was to happen if he files a proof of
8 claim without this determination that it was a wrongful
9 conviction? The policy implications are very, very
10 interesting.

11 What is he really supposed to do? He files this
12 claim, and he could face possible sanctions because he
13 doesn't have a claim. He doesn't have a case until it's been
14 set aside.

15 I mean, if we were to go through and take a vote
16 on everybody in prison who believes that they were wrongfully
17 convicted, I think we'd see a pretty strong showing of hands.

18 And I don't think the policy and the underlying
19 intent of all of this is to put that type of a burden on all
20 of these inmates to say, hey, if you think you've got a, you
21 know, possible claim, although you might get sanctioned for
22 filing a frivolous either lawsuit or notice of claim, you
23 better -- you better do it. And I don't think that's the
24 intent. So I think --

25 THE COURT: Well, Mr. Ricks had filed a proof of

1 claim in the City's bankruptcy case by the bar date, which I
2 think was February 13, 2014, or thereabouts. If he had done
3 that, and, of course, that was a time when his conviction had
4 not yet been set aside. That happened in 2017, it seems
5 undisputed in this case. But it hadn't happened yet. He was
6 still trying to get it -- get relief, get it set aside, get
7 freed, but he hadn't been yet.

8 So if he had filed a proof of claim then, it seems
9 to me in terms of that sort of bankruptcy world it would be
10 deemed a contingent claim. That is, it's a claim that's
11 contingent upon obtaining -- setting aside of the conviction,
12 which had not happened yet.

13 And if that contingency doesn't come to pass, then
14 he would -- the City would never -- could never possibly owe
15 him a debt on a *Monell*-type claim.

16 But if it did come to pass later, at a later date,
17 the City might. Or at least his claim wouldn't be subject to
18 dismissal, in effect, or rejection on the ground of *Heck*,
19 that it hadn't accrued yet.

20 In bankruptcy when a contingent claim is filed it
21 doesn't necessarily get disallowed just because it's a
22 contingent claim, but there is a provision in the Bankruptcy
23 Code for estimating contingent claims under certain
24 circumstances where you don't know if the contingency will
25 happen, or not yet.

1 And so there's a process for estimating for
2 purposes of claims allowance in the bankruptcy case.

3 So it's not enough when somebody files a
4 contingent claim like that, in this scenario I'm -- the
5 hypothetical scenario I'm describing, the City, it's not
6 enough for the City to have objected to that just on saying
7 it's contingent, the conviction hasn't been set aside yet, so
8 there's no claim accrued, so we owe them nothing.

9 It's not enough, because if the contingency occurs
10 later, that argument goes out the window. So the claim, the
11 contingent claim has to be estimated. That's the idea there.
12 Okay.

13 MR. HARRINGTON: Understood. And I don't --

14 THE COURT: So it's not -- it's not just that the
15 claim would have been rejected out of hand in the bankruptcy
16 case only because it was then contingent. You see what I'm
17 suggesting?

18 MR. HARRINGTON: In concept, yes.

19 THE COURT: Okay.

20 MR. HARRINGTON: But I don't think that applies
21 here. And how tenuous of a claim, or as you would maybe say,
22 how tenuous of a contingency would be allowed, would be okay,
23 would not be sanctionable or deemed to be a frivolous filing
24 with the Court. I mean, I mean, how far --

25 THE COURT: That's part of what bankruptcy courts

1 have to figure out when they are doing this type of claims
2 estimation process on a contingent claim that I've -- or on
3 an unmatured or contingent, either one, claim that I've been
4 describing to you.

5 MR. HARRINGTON: Right.

6 THE COURT: It's not necessarily an easy thing to
7 do.

8 MR. HARRINGTON: And that's what I'm --

9 THE COURT: It's not a -- there's no science to
10 that. It's not a scientific precision.

11 MR. HARRINGTON: Well, and that's what I'm getting
12 at. Because what would have to happen is would be literally
13 a whole almost a trial within a trial on the evaluation of
14 Mr. -- the viability of his claim, and so we would literally
15 have a trial within a trial to determine how viable this is.

16 Because if that was the case, and if everybody who
17 is currently incarcerated at the hands of the Detroit Police
18 Department for, let's just say, you know, gross mishandling
19 of evidence -- and I'm not -- I'm not casting stones, I'm
20 just saying let's just assume that for this discussion. How
21 many people would have to come forward and literally try
22 their case to say, Your Honor, look at my contingencies, if
23 this, and this, and then this, this, this, and this actually
24 come to fruition, then I'm going to have a great case.

25 And so where are we with that? What is -- and

1 that's why I think when this Court, this Bankruptcy Court,
2 today, can look at all of the circumstances surrounding, and
3 I think with this imprisonment case it presents a bit of a
4 different picture, because without -- no matter what Mr.
5 Ricks thinks, no matter what he knows, no matter what he
6 says, what he researches, if he doesn't have the exoneration,
7 there is no claim. So I guess the question really for the
8 Court is, is how tenuous, I mean, how many times are
9 convictions really turned over?

10 So my position to the Court is, is that if you are
11 even looking at this, which I would ask you -- what I would
12 suggest that it doesn't apply, but if you're looking at this
13 as to the contingencies by as far removed in the, really, the
14 likelihood of him actually getting a conviction overturned
15 for somebody who has spent over 20-some years in prison, it
16 almost never happens.

17 So you're talking about, really, the Hail Mary of
18 all Hail Mary's happening and that's the contingency that
19 the, that the City wants you to, if you're going to apply
20 this contingency-type of analysis, they would look at this as
21 like a cover the eyes, and we're almost in March madness,
22 cover the eyes, inbound pass, without looking over the
23 shoulder and it's the swish and we win by one at the buzzer,
24 and --

25 THE COURT: You know, though, really, what you're

1 arguing sounds like an argument in substance. An argument
2 against the fair contemplation test, rather than an argument
3 that says courts, Bankruptcy Courts should use the accrual
4 test, and the case law has rejected that. I have rejected
5 that.

6 Many bankruptcy cases have rejected that accrual
7 test as inconsistent with Congressional intent in the very
8 broad definition of claim that's in the Bankruptcy Code. And
9 you know that, because you've read -- you've read my opinion
10 in the City of Detroit case, I assume, that's cited.

11 MR. HARRINGTON: Yes.

12 THE COURT: And you've read the *Sanford* case, I
13 assume?

14 MR. HARRINGTON: Yes.

15 THE COURT: And have you read the *Monson* case?

16 MR. HARRINGTON: I have not.

17 THE COURT: Okay.

18 MR. HARRINGTON: I will.

19 THE COURT: It's very similar to *Sanford*.

20 MR. HARRINGTON: And I would love it if the Court
21 did apply the accrual test, because then this would be
22 extremely easy.

23 But under the reasonable contemplation, or the --
24 I'm sorry, the fair contemplation test, as we look at it to
25 the Ricks case, I think creates a situation where how can he

1 reasonably contemplate that he has a claim? Even in his
2 mind, he knows what he did. He knows what he didn't do.

3 But, in order to get -- I mean, the mountains that
4 have to be moved for that to happen is really, I mean, there
5 is his subjective belief and then there is a reasonable
6 belief, and if we look at this, how could he -- we know that
7 he got out and he was exonerated. But as we sit here
8 evaluating it before it could happen, how could we reasonably
9 believe, in light of all of the evidence, in light of what we
10 know, in light of 20-some years having been in prison, how
11 could we reasonably believe that he has a cause of action?

12 And so I guess even when you apply the fair
13 contemplation test, I believe that under the authority -- and
14 I appreciate the --

15 THE COURT: Well, what about -- in relating to
16 that question, what about what David Townsend was saying, as
17 of October 2, 2012, in his phone call with Sally Larson of
18 the Michigan Innocence Project, about the ballistics tests
19 and the ballistics evidence in Mr. Ricks' case?

20 MR. HARRINGTON: Yeah.

21 THE COURT: That's exhibit 14 --

22 MR. HARRINGTON: No, I --

23 THE COURT: -- to the City's reply brief.

24 MR. HARRINGTON: No, I understand.

25 THE COURT: You've seen it.

1 MR. HARRINGTON: Yes. I know. Where he's talking
2 about how, I think it was about the soft lead and talking --
3 correct me if I'm wrong. Right? Where he's talking about
4 the soft lead, he would expect to have seen more damage to
5 the, to the bullet. He's just providing evidence in support
6 of that.

7 And look, I don't disagree that that evidence
8 brings it closer to whether or not he has a claim, but
9 there's still an incredible hurdle that has to be overcome to
10 get the conviction over --

11 THE COURT: Is it fair to say that at least as
12 early as the time frame 2009 through 2012, time frame of
13 these exhibits that are attached to the City's reply, that
14 Mr. Ricks and his ballistics consultant, Mr. Townsend, and
15 the people at the Michigan Innocence Clinic, Project Clinic
16 that we're investigating this case for Mr. Ricks, with him,
17 all had reasons to believe that the ballistics evidence in
18 this case was simply wrong and bad evidence, and upon
19 retesting would lead to, it would lead to setting aside the
20 conviction?

21 MR. HARRINGTON: Okay. If I can break --

22 THE COURT: Now, that last part is a little
23 trickier than the first part of my question.

24 MR. HARRINGTON: Right. Because the last part of
25 your question --

1 THE COURT: You got to find the bullets.

2 MR. HARRINGTON: Well --

3 THE COURT: The real bullets you got to find.

4 MR. HARRINGTON: Right. But the last part of what
5 you just said is to overturn the conviction which presumes
6 that you can anticipate, number one, what a judge is going to
7 do, what an appellate court is going to do, and what the
8 highest court would do. So that presumes quite a bit.

9 And one thing that my father taught me, who is an
10 attorney, is you never presume ever, ever, ever what a judge
11 is going to do. So I think all that he can really assume is
12 that he is building and trying to build a case.

13 I mean, it's clear, there's no doubt he's trying
14 to, one, he's trying -- not trying to build a case, trying to
15 get out of prison for a crime he never committed.

16 But number two, he's trying to build evidence to
17 do just that. But to make -- to have that evidence and to
18 take that leap to say that he knows, reasonably knows, that a
19 judge is going to side with him I think is way too far
20 tenuous and it comes back to the Hail Mary and it doesn't
21 fall within the fair contemplation because it is so tenuous.
22 Because it would require --

23 THE COURT: In your view, when did it become not
24 so tenuous? When in time?

25 MR. HARRINGTON: When he was --

1 THE COURT: What event and when did it happen that
2 it became not so tenuous? We know in 2017 there came a time
3 when the conviction was vacated, I presume, or charges were
4 dismissed. It was over. He was freed. But at some point
5 before that event it must have become apparent that he had a
6 strong case for vindication.

7 MR. HARRINGTON: I will say this, and I know
8 you're going to say, Mr. Harrington, now you're arguing
9 accrual, but this is a rare circumstance where I believe the
10 roads have merged, and I believe that at the time that that
11 reversal of the conviction came down, was inked at that time,
12 and maybe even I would go so far as to say after all
13 appellate remedies have been expired, at that point in time
14 would be the time when we would apply his contemplation of
15 the claim.

16 Going through the fair contemplation analysis, I
17 think we get to the same location that you do under the
18 accrual, because otherwise to apply to, to -- because really
19 what it requires is, is it requires Mr. Ricks to have a
20 reasonable belief that the judge is going to set aside the
21 conviction. And I don't know a person in this world that
22 could ever reach that conclusion. It's just not possible.

23 And also, I'm not trying to go backwards or
24 sideways on anything. You know, or position obviously is
25 that we would ask that you deny the City's motion, or

1 alternatively abstain and have this heard by the District
2 Court, as one of the other cases have, and plus that this
3 case --

4 THE COURT: Well, wait a minute. You're saying if
5 I'm not inclined to -- if I'm not going to rule for you, I
6 should -- I should not rule and let the District Court
7 decide. But otherwise, you want me to decide.

8 MR. HARRINGTON: Judge, I'm just being an
9 advocate.

10 THE COURT: I mean, you can't do that. You can't
11 argue that. You want this Court to decide this, or don't
12 you?

13 MR. HARRINGTON: I want you to decide this, Your
14 Honor.

15 THE COURT: All right.

16 MR. HARRINGTON: I think I'm right on the
17 position.

18 THE COURT: But you want this Court to decide it.
19 You don't want me to abstain.

20 MR. HARRINGTON: No, Judge, I want you to decide
21 it.

22 THE COURT: Okay. All right. All right.

23 Well, so when -- the conviction was vacated, I
24 guess. Is that the right term?

25 MR. HARRINGTON: Yeah. Yeah. It was over --

1 yeah. Overturned.

2 THE COURT: What's the correct terminology of what
3 happened? Some circuit judge, some Michigan circuit judge
4 vacated the conviction? What was it?

5 MR. HARRINGTON: For lack of a better term, I'm
6 just, I'm going to go with the --

7 THE COURT: Maybe it's in your first amended
8 complaint. But what happened exactly?

9 MR. HARRINGTON: May I have just one second, Your
10 Honor?

11 THE COURT: Yeah. Uh-huh.

12 MR. HARRINGTON: Because I don't believe that I --

13 THE COURT: I'm looking at paragraph 78 of your
14 first amended complaint. It's exhibit 6 to the City's motion
15 in this case, docket 13,000.

16 Well, it says when he was released. Paragraph 78
17 says the day he was released from prison. Paragraph 79 says
18 June 1, 2017, charges were dismissed by the Wayne County
19 Prosecutor's Office. Maybe it doesn't say when the
20 conviction was actually vacated, or what. Or is it in there
21 somewhere?

22 MR. HARRINGTON: I'm looking, as well, Your Honor.
23 I apologize for not having it in my --

24 THE COURT: I thought I saw somewhere, maybe I'm
25 thinking of a different case, but where some state court

1 vacated the conviction, ordered a new trial, did something.

2 MR. HARRINGTON: Just a moment, Your Honor.

3 THE COURT: Yeah. Uh-huh.

4 (Pause)

5 MR. HARRINGTON: What I do have, Your Honor, is
6 there is exhibit 4. It looks like it was exhibit 4 to the
7 City of Detroit's motion dated June 1st, 2017, of a
8 motion/order of nolo -- I apologize for lack of
9 pronunciation, but *nolle p-r-o-s-e-q-u-i*, meaning that
10 they're not going to prosecute, and the case was dismissed
11 without prejudice. And I think for --

12 THE COURT: Okay. Hold on one second. I'm
13 looking at the City's exhibit 4, it's docket 13,000 in this
14 case. Hold on.

15 MR. HARRINGTON: I'm sorry, Your Honor.

16 THE COURT: It's docket number 13,000 in this
17 case. The motion, City motion, I'm looking at it. It's
18 exhibit 4 you've just cited me to, right?

19 MR. HARRINGTON: It looks like -- I apologize. It
20 looks like it's exhibit -- if you look at exhibit 6, it's the
21 amended complaint, and it's exhibit 4 to the amended
22 complaint.

23 THE COURT: Oh, I see. Yeah. All right. I think
24 I'm there. Hold on.

25 MR. HARRINGTON: And that looks like the order.

1 THE COURT: Okay. It's State of Michigan, Third
2 Judicial Circuit, Wayne County, motion/order of *nolle*
3 *prosequi*, and there is a motion, I presume, by the
4 Prosecutor's Office, and an order granting that motion,
5 saying the motion is granted and the case is dismissed
6 without prejudice, June 1, 2017, signed by the judge. That's
7 what you're talking about, right?

8 MR. HARRINGTON: Yes.

9 THE COURT: Okay. So that would be when the,
10 basically when the City moved to dismiss the case and --
11 criminal case, and the judge granted it.

12 At some point before that date was there --
13 there's a conviction, a judgment of conviction and sentence
14 on the books before -- it must have been, something must have
15 been done with it before there could be a dismissal of the
16 case. I mean, I'm just assuming, I'm guessing that that's
17 got to be true. Was there some order that preceded this June
18 1, 2017 order that vacated the conviction, for example? Do
19 you know?

20 MR. HARRINGTON: I don't know. At the -- I could,
21 I'd be happy to give you more procedural history on
22 supplemental briefing and I could limit it to two pages.

23 THE COURT: Well, I'm kind of working my way
24 backwards a little bit in time chronologically. And what I'm
25 trying to get to is, part of what I'm trying to get to is, at

1 some point -- assuming there was an order at some point in,
2 let's say in some time in 2017, before June 1, vacating the
3 conviction ordering a new trial, doing something that took
4 the conviction off the books and restored the case as a
5 pending criminal case that had to be dealt with, there must
6 have been a motion, a briefing, some sort of presentation to
7 the Court, even if it was just a stipulation between Mr.
8 Ricks and the Prosecutor's Office, something that triggered
9 that action by the Court.

10 And I'm asking, you know, what was that, and when
11 was that filed? And in sort of working backwards it's, you
12 know, at some point, at least potentially, at some point
13 before there was actually an order vacating the conviction,
14 there must have been a reasonable anticipation by Mr. Ricks
15 or his attorneys that the conviction would be vacated.

16 MR. HARRINGTON: Can I make a comment?

17 THE COURT: And the question is: When did that
18 happen?

19 MR. HARRINGTON: Let me make a comment.

20 Hypothetically, if there was some type of motion
21 for a new trial, based on either newly discovered evidence or
22 something of that kind, and let's say the judge granted --
23 and I'm, and I'm -- literally, Judge, I'm just speaking out
24 of -- off the cuff. If there was some type of motion for a
25 new trial, and say the judge granted it, I think you're

1 asking me, Mr. Harrington, okay, I see this order where
2 they're saying they're not going to prosecute anymore, but we
3 do know that there was a conviction, so we have this window
4 of time.

5 What happened in that window to get us to this
6 order that says no conviction? Was there a motion for new a
7 trial that was granted by the judge? Was there some, as you
8 say, stipulation?

9 And as I stand here today, Your Honor, I don't
10 have the answers to that. I could have those answers to you
11 on extremely short order. I can limit it to one to two pages
12 of just bullet point dates with the appropriate exhibits for
13 you to examine. I just don't have those at my fingertips
14 now, and I --

15 THE COURT: Well, the record in -- strictly
16 speaking, the record in this bankruptcy case, I think, does
17 not show when there was this new testing of bullets, which I
18 thought I remembered that there was new testing of bullets,
19 that showed that the bullets, the actual bullets that were
20 recovered from the deceased victim's body were not a match to
21 the gun that was connected to Mr. Ricks through his mother.

22 But there may be something about that in the
23 District Court record, which, of course, has -- you know, the
24 motion for summary, the cross motions for summary judgment
25 have a million exhibits. There's tons of stuff in there, and

1 I didn't go and look through all that. But do you know that?
2 Was there new testing that basically triggered this relief
3 from the conviction?

4 MR. HARRINGTON: Well, I know that -- yes, I know
5 that there is testing from David Ballish, who is a retained
6 expert. I know there is -- here's what I don't know, and I
7 know you want answers to this and I don't know the dates of
8 when that occurred.

9 And from listening to this Court, I do think that
10 it's important that we have those dates because I think it
11 would help analyze this. But I don't have those dates, Your
12 Honor.

13 THE COURT: You don't know offhand if there's
14 anything in the record of the District Court that I can look
15 at to get me to get that information? I know if we dig, it
16 might be in there.

17 But I'm asking whether you happen to know offhand
18 where that may be, where that is in there. I presume it
19 would be, if it's anywhere, it would be in one or more of the
20 summary judgment exhibits.

21 MR. HARRINGTON: We would -- we would have to
22 consult with the motion, cross motions.

23 THE COURT: As I said, there's a lot of exhibits
24 there.

25 MR. HARRINGTON: Right. We had two people from

1 our appellate department --

2 THE COURT: Yeah.

3 MR. HARRINGTON: -- writing it. And I'm more of
4 trial counsel on the case --

5 THE COURT: Okay.

6 MR. HARRINGTON: -- and so I'm not going to -- I'm
7 not going to make anything up and I'm not going to
8 misrepresent and just say, yeah, it's there and just hope it
9 is. But I would -- I'm making an oral request, I guess, to
10 be able to issue the Court supplemental briefing on these
11 just narrow issues and for the factual basis.

12 THE COURT: Your view, I take it from what you've
13 said, of the fair contemplation test as applied in this case
14 is that the issue is at what point did Mr. Ricks first have
15 enough information to give him -- to justify a reasonable
16 belief, reasonable belief, that his conviction would be set
17 aside?

18 MR. HARRINGTON: In June of '17 when --

19 THE COURT: No, I'm saying --

20 MR. HARRINGTON: Oh, I'm sorry.

21 THE COURT: -- that's your view of how the -- what
22 the issue is under the fair contemplation test in this case.
23 Is that right?

24 MR. HARRINGTON: Yes. When -- yes.

25 THE COURT: And --

1 MR. HARRINGTON: I mean, that's --

2 THE COURT: And how do we know when that was?

3 MR. HARRINGTON: That's what I was just going to
4 say.

5 THE COURT: Based on what's currently in the
6 record.

7 MR. HARRINGTON: Well, I guess what we can look at
8 is the order of the June -- exhibit 4 of the of first amended
9 complaint, that is exhibit 6, to the Defendant -- the City of
10 Detroit's motion where -- it would be June 1st, 2017, where
11 they're not going to prosecute.

12 Where that decision is made, I believe that would
13 be -- that would be the time. Because I -- and I think your
14 question, if I heard you correctly, was, Mr. Harrington,
15 based on the record that's in front of me, meaning the
16 motion, your response, and the reply. Is that what you're
17 asking?

18 THE COURT: Yeah. I'm not including the District
19 Court record at this point.

20 MR. HARRINGTON: That's what I thought.

21 THE COURT: Though this Court I think technically
22 can take judicial notice of anything that's filed as a matter
23 of public record over in that District Court case. It's
24 available to me electronically as I'm sitting right here at
25 my computer. But, yeah. Well, you're pegging it at the date

1 on which, the earliest date upon which the *Monell* claim could
2 have, could be deemed to have accrued. That's where you're
3 saying they merge. It's the same date.

4 MR. HARRINGTON: Yeah. Under the analysis of fair
5 contemplation versus accrual, whether you walk through the
6 steps of the fair contemplation, it ends up being the same
7 date as the accrual.

8 THE COURT: So how do we know though -- how do we
9 know that there wasn't some date or time before June 1, 2017,
10 and perhaps well before that time, when Mr. Ricks knew enough
11 of the facts, or knew facts that would give -- that would
12 justify a reasonable belief that his conviction would be set
13 aside?

14 MR. HARRINGTON: Sure. That's fairly -- I can
15 answer that. That's, in my mind, I think fairly simple.
16 Because if it's let's just say a set aside, and the
17 conviction was overturned, but let's say it comes about
18 through a motion for a new trial, well there is still a new
19 trial that is in place and the prosecutors could still have a
20 -- get a conviction.

21 And so if Mr. Ricks was to have immediately have
22 filed his 1983 *Monell* claim while this -- while the Wayne
23 County Prosecutor's Office still has the case open and
24 pending, well, if they go and get a conviction again, and
25 he's got his 1983 *Monell* claim, it all goes away. There is

1 no case. I mean, it's -- it would be summarily dismissed on
2 its face, really, by 12(b)(6). It wouldn't even -- I mean,
3 maybe Rule 56, but it would be -- it would be just gone.

4 THE COURT: Well, what I'm getting at is it seems
5 to me that the record before me in this bankruptcy case, that
6 is the papers filed by the City and by you, your side,
7 relating to this motion, including these exhibits attached to
8 the City's reply brief, maybe don't necessarily enable this
9 Court to answer the question: Was there a time before June
10 1, 2017, when Mr. Ricks had facts, knew facts, that would
11 justify a reasonable belief that his conviction would be
12 vacated and that he would not again be convicted?

13 You know, if, just hypothetically speaking, on,
14 you know, June 1, 2013, a month before the City filed its
15 bankruptcy case, facts came to light, facts became known that
16 made it clear that -- evidence and facts that made it clear
17 that Mr. Ricks was wrongfully convicted and that he -- that
18 the City had no -- or the county, county prosecutor had no
19 hope of convicting him in a new trial of this murder, then it
20 would seem to me under that hypothetical situation, clearly
21 under the fair contemplation test, the claim had to -- would
22 have to be deemed to have arisen at that time, pre-petition.
23 Do you see what I'm saying?

24 MR. HARRINGTON: Yeah. And if it -- can I add to
25 that, if I may?

1 THE COURT: So what I'm -- what I'm getting at is,
2 it seems to me the record doesn't, at present, doesn't
3 necessarily permit this Court to conclude that that time,
4 that time when that happened, that fair contemplation first
5 happened under the test you -- the way you framed the issue,
6 didn't have pre-petition before the June -- the July 2013
7 bankruptcy case filed.

8 MR. HARRINGTON: I agree with you. And if I may
9 add, for example, if there was something in the record where
10 the prosecutor's office walked into his cell and said, you
11 know, we've been looking over everything that you've
12 submitted to us. We've just got some paperwork to go over,
13 the City, Mr. Ricks, even though it wasn't our doing, screwed
14 up. You have a great case. We're going to do this
15 paperwork, your case will be dismissed, and then we want you
16 to file your 1983 claim against the City.

17 Now, pretty sure that didn't happen, but it would
18 -- I would be hard pressed to argue the position that I'm
19 arguing before this Court if those were the facts. Because
20 if at that time, and say, you know, I'm sorry the date and
21 year, the 2000 -- you know, pre-petition stuff, if that, if
22 that conversation happened under the reasonable contemplation
23 as to whether or not he has a case, he's being told by the
24 people prosecuting him that he does.

25 THE COURT: Well, but you don't have to go that

1 far to get to fair contemplation.

2 MR. HARRINGTON: I know. But --

3 THE COURT: I mean, there's some -- let me, let me
4 ask it this way. There's some event, or events, that
5 occurred that basically triggered or opened the door for Mr.
6 Ricks to get his conviction vacated and to be freed.

7 MR. HARRINGTON: Yes.

8 THE COURT: What was it? Was it new ballistic
9 testing? What was it?

10 MR. HARRINGTON: It was the culmination of all of
11 the evidence that he had been getting. But is the question
12 that you're asking me, is it what was the triggering event
13 through the court process that --

14 THE COURT: What occurred. What occurred that
15 made it possible, or even likely, or even inevitable, that
16 this conviction was going to be vacated? What occurred?

17 MR. HARRINGTON: Based on the record that you have
18 in front of you, I believe, Your Honor, that it is an
19 insufficient record to answer that exact question.

20 THE COURT: Is there anything in your first
21 amended complaint which is in the record here in this case
22 that would give any clues about that? That's a long
23 complaint, and I didn't read every paragraph, I confess. I
24 was looking at things, certain specific things in there at
25 the time, and didn't go through and read them all.

1 MR. HARRINGTON: Well, I'm going to start with,
2 again, with exhibit 4, which is the order that we've talked
3 about. You also have, you know, the exhibit 3. You also
4 have ballistics, you know, ballistics testing. Same with
5 exhibit 2, there's forensic laboratory testing. And those
6 are dated in March of 2017, November 2017. And then the
7 order of the dismissal, or the nolle prosecution, ending up
8 dismissing the case was June 1st of '17. So all three of
9 those pieces of evidence were obtained post-petition.

10 THE COURT: Okay. So you're pointing me to
11 exhibits to your first amended complaint that are in the
12 record in this case?

13 MR. HARRINGTON: Yes, Your Honor.

14 THE COURT: What about allegations in the first
15 amended complaint? Do any of those shed a light on the
16 timing of these events that triggered the vindication,
17 essentially, of Mr. Ricks?

18 MR. HARRINGTON: And specifically focusing on when
19 that date occurred?

20 THE COURT: What the events were and when they
21 occurred, or at least what the events were.

22 (Pause)

23 MR. HARRINGTON: I'm reading through paragraph 48
24 on page -- it looks like it's page 12, Your Honor.

25 THE COURT: I see that.

1 MR. HARRINGTON: That talks about testing done by
2 Detective Sergeant Dean Molnar. He conducted some type of,
3 it looks like, test in April, May of 2017.

4 THE COURT: I see that. Anything else?

5 MR. HARRINGTON: I'm going through it as I flip
6 the pages, Your Honor.

7 (Pause)

8 MR. HARRINGTON: On -- again, and I turn back to
9 paragraph 78 which you had previously identified, talking
10 about May 26 when he was released from the Ionia Correctional
11 Facility.

12 THE COURT: I mean, his conviction must have been
13 vacated, you would think, before that date, right? There's
14 nothing in the first amended complaint, is there, showing
15 what happened to his conviction in that way.

16 MR. HARRINGTON: And I've flipped through it and
17 I've read it, Your Honor. No, I don't -- I don't believe
18 that's in there. And as I've stated, I'd be, I'd be happy to
19 provide that with this Court.

20 THE COURT: All right. Anything else in the first
21 amended complaint you want to point me to?

22 MR. HARRINGTON: No, Your Honor.

23 THE COURT: Okay. What else would you like to say
24 about the motion, then?

25 MR. HARRINGTON: No, I have nothing else to add,

1 Your Honor. Thank you for being so well read.

2 THE COURT: All right. Thank you.

3 Mr. Swanson, you may briefly reply in support of
4 your motion, if you would like.

5 MR. SWANSON: Your Honor, two points. The first
6 is, I wanted to correct something I said earlier.

7 In the City's summary judgment brief in the
8 District Court case, docket number 91, case 17-12784, on page
9 34, the City does argue that Plaintiff's claims are barred by
10 the applicable statute of limitations because accrual occurs
11 when a plaintiff has a complete and present cause of action.
12 That is when the plaintiff can file suit.

13 The City thus argued that all of Plaintiff's
14 claims in the Federal District Court action, I guess,
15 including those against the City, were time-barred under the
16 applicable statute of limitations.

17 THE COURT: What does that have to do with
18 anything? What's the point of that, of the -- of you making
19 this point?

20 MR. SWANSON: Well, that the statute of
21 limitations would presumably run when the cause of action
22 accrued. And the City's arguing and --

23 THE COURT: When does the -- does the City make an
24 argument about when the cause of action accrued in that paper
25 there?

1 MR. SWANSON: Well, it argues that the -- that Mr.
2 Ricks was free to file suit in 1992 on all of his claims.
3 And because he didn't file suit then when the cause of action
4 accrued, that that all of the claims are barred by statute of
5 limitations.

6 THE COURT: Well, I must have misunderstood, then.
7 I thought the City, in connection with this motion, basically
8 was not disputing that the claim, the *Monell* claim, did not
9 accrue until the Ricks conviction was vacated, and that
10 didn't occur until 2017.

11 MR. SWANSON: The City has taken --

12 THE COURT: Isn't that what -- isn't that what you
13 were agreeing to?

14 MR. SWANSON: Well, I tried to say, Your Honor
15 I -- you know, I had not looked into that and had not taken a
16 position. I pointed the Court to a quote from the *Sanford*
17 case, but I didn't take a position on that issue in my
18 pleadings, and then I went --

19 THE COURT: Well, what's the City -- tell me in
20 more detail, what's the City's argument about this in the
21 City -- in the Ricks case.

22 MR. SWANSON: Sure.

23 THE COURT: The cause of action under *Monell*
24 accrued in 1992, is the City saying?

25 MR. SWANSON: In Michigan, a three-year statute of

1 limitations applies to federal claims brought under 43 U.S.C.
2 1983, citing a *Scott* decision from the Sixth Circuit.

3 THE COURT: Yes.

4 MR. SWANSON: And a *Wallace* decision from the
5 Supreme Court.

6 Quote, "Accrual occurs when the plaintiff has a
7 complete and present cause of action, and that is when the
8 Plaintiff can file suit," close quote.

9 The limitations period for Plaintiff's claim for
10 intentional infliction of severe emotional distress is also
11 three years, citing MCL 600.5805 subsection --

12 THE COURT: Focus on the *Monell* claims, would you?

13 MR. SWANSON: Sure. I think they --

14 THE COURT: That's the only claim that's asserted
15 against the City. *Monell* is, right?

16 MR. SWANSON: *Monell* is the only claim that's
17 asserted.

18 THE COURT: It's number one in the first amended
19 complaint.

20 MR. SWANSON: That's right.

21 THE COURT: What does the City say about the
22 statute of limitations with respect to that claim in their
23 summary judgment motion in the City case -- in the Ricks
24 case? Anything?

25 MR. SWANSON: In 1992, there was no bar to play to

1 bringing suit against the City of Detroit and its police
2 officers. Plaintiff failed to do so, and, therefore, his
3 claims are barred.

4 THE COURT: And the statute of limitations is how
5 long?

6 MR. SWANSON: Three years.

7 THE COURT: The City says?

8 MR. SWANSON: Yes.

9 THE COURT: Three years. Well, what about this
10 concept, is the City simply -- is the City saying the *Monell*
11 claims accrued in 1992 in that brief?

12 MR. SWANSON: Yes.

13 THE COURT: It is? Is there -- what authority is
14 there for that proposition?

15 MR. SWANSON: It cites *Scott v. Ambani*, 577 F. 3d
16 642, 646, a Sixth Circuit case, 2009.

17 THE COURT: What about the *Heck* case?

18 MR. SWANSON: The *Heck* case talks about malicious
19 prosecution. I don't necessarily think that applies to a
20 *Monell* claim against a municipality.

21 THE COURT: Okay. So now are you -- are you now
22 saying that the City, in support of this motion in this
23 Court, is now saying that the *Monell* claims asserted in count
24 1 of the first amended complaint of the City in the Ricks
25 action against the City accrued in 1992?

1 MR. SWANSON: Yes.

2 THE COURT: They did. Okay. Now that, of course,
3 is not an argument you made in your reply brief.

4 MR. SWANSON: That's correct.

5 THE COURT: Or in your motion. In your reply
6 brief you said accrual isn't the test.

7 MR. SWANSON: Yeah. We don't think accrual is the
8 test.

9 THE COURT: It's fair contemplation. It's not
10 accrual.

11 MR. SWANSON: Yeah.

12 THE COURT: You know, if the -- if the claim
13 actually accrued before the bankruptcy was filed, even under
14 the accrual test, this claim would be barred by the discharge
15 order. Right?

16 MR. SWANSON: That's correct. I think Plaintiff
17 is -- to the City it's really not relevant when the claim
18 accrued, because the Court does not apply the accrual test.

19 The Court looks at the facts and circumstances
20 underlying this claim. The Court, in its opinion --

21 THE COURT: Well, if the claim accrued under non-
22 bankruptcy law pre-petition, isn't it always going to be
23 deemed a pre-petition claim under the fair contemplation
24 test?

25 MR. SWANSON: I think Plaintiff here would argue

1 that even if it accrued it wasn't within Plaintiff's fair
2 contemplation until the conviction was overturned, and
3 thus --

4 THE COURT: You're not answering my question.
5 They're saying it didn't accrue until the conviction was
6 vacated. They're saying that, and they're citing *Heck*.

7 But my question is: Isn't it always going to be
8 the case that if a cause of action actually accrued under
9 applicable non-bankruptcy law before the bankruptcy petition
10 was filed, that claim is going to be deemed a pre-petition
11 claim under the fair contemplation test.

12 MR. SWANSON: The fair contemplation test does not
13 include as a factor the date that the claim actually accrued.
14 And thus, you know, I haven't thought of --

15 THE COURT: Well, it includes all relevant
16 circumstances.

17 MR. SWANSON: Yes.

18 THE COURT: Right?

19 MR. SWANSON: I mean, it --

20 THE COURT: All the circumstances surrounding a
21 particular claim, including the Debtor's conduct, the party's
22 pre-petition relationship, the party's knowledge, elements of
23 the underlying claim.

24 So I would think courts could consider if the
25 claim accrued under non-bankruptcy law, pre-petition,

1 certainly that would be a factor, if not conclusive, very
2 close to being conclusive, in establishing that it's a pre-
3 petition claim under the fair contemplation test, don't you
4 think?

5 MR. SWANSON: I'm not going to argue with that
6 point.

7 THE COURT: I'm trying to think. It's kind of
8 hard for me to think of a situation where that wouldn't be
9 the case.

10 So if the claim really did accrue before the
11 conviction, Mr. Ricks' conviction was vacated, or whatever
12 happened to it, that puts a whole new light on this issue, I
13 think.

14 MR. SWANSON: It very well might. In the Court's
15 opinion that I cited in my reply there was, I believe, some
16 uncertainty in terms of whether those claims had accrued
17 under non-bankruptcy law prior to the petition date. The
18 claims of Tanya Hughes, for one.

19 And this Court wrote, you know, that certainty is
20 not the standard. It's not the standard that the Plaintiff
21 knew for sure that the claim had accrued or that they for
22 sure had a claim that which could be asserted.

23 The Plaintiff here professed his innocence from
24 day one, and starting in 2011, he employed, or he utilized,
25 the services of an investigator, a paralegal, a team of

1 lawyers, and his previous expert, to prove his innocence. He
2 was -- he was telling all of these people that he had a claim
3 against the City of Detroit because he was unlawfully
4 convicted.

5 And he was pointing to the same evidence which
6 allegedly resulted in him being freed from prison. In his
7 own words he had a claim in 2011. We know it because he said
8 it.

9 Under the fair contemplation test rarely do you
10 get evidence that's this crystal clear that a Plaintiff knew
11 that they had a claim. I mean, he said it in the letter, and
12 people on his behalf were telling the U.S. District Attorney
13 that he had a claim. If that's not enough, I don't know what
14 does it. All of the conduct here, again, occurred in 1992.
15 We have the Plaintiff on record --

16 THE COURT: Is it enough under the fair
17 contemplation test for a claimant to subjectively think they
18 have a claim, or believe they have a claim, if that belief is
19 not objectively reasonable at the time?

20 MR. SWANSON: Yes.

21 THE COURT: You think it is?

22 MR. SWANSON: I think if the Plaintiff believes
23 that they have a claim against the City that's within their
24 fair contemplation. I mean, their subjective belief is part
25 of the fair contemplation test. What do they believe? Do

1 they believe they have a claim against the City or not? We
2 don't necessarily need all of the objective evidence to line
3 up before the bar date for this Court to hold that a claim
4 within the Plaintiff's fair contemplation against the City.

5 I mean, as this Court wrote, Congress included the
6 words "contingent," "unmatured," "disputed" within the
7 definition, Section 1015, of the term "claim."

8 This Court also wrote that Congress used those
9 words because it wanted to adopt the broadest definition of
10 claim possible.

11 I don't see how this Court could rule that a
12 plaintiff who was putting down in writing and telling people
13 prior to the City's bankruptcy case that he had a claim
14 against the City, that that claim wasn't within his fair
15 contemplation. I mean, he was asserting a claim. He was
16 telling people he had a claim. I don't know what else,
17 really, could cause the Court to rule that this was within
18 his fair contemplation.

19 Again, Your Honor, certainty is not the standard.
20 What Plaintiff continues to argue is that we have to wait
21 until this claim accrued under their theory of when accrual
22 occurred, and that's not the test. The test is fair
23 contemplation, and we should take it from Mr. Ricks' own
24 words. He knew he had a claim before the City filed for
25 bankruptcy.

1 Thank you.

2 THE COURT: All right. Thank you, both. I'm
3 going to rule on this motion now.

4 (Pause)

5 THE COURT: With respect to jurisdictional
6 matters. First of all, this Court has subject matter
7 jurisdiction over this bankruptcy case and this contested
8 matter that's represented by the City's current motion and
9 which, of course, is contested by the Ricks plaintiffs.

10 And this is a core proceeding, and all of this is
11 true for the very same reasons that I stated that the matters
12 before me in the published opinion that I'm going to cite
13 were covered by the Court's subject matter jurisdiction and
14 were core proceedings.

15 And also, by the way, proceedings in which the
16 Court reserved jurisdiction to rule in the confirmed Chapter
17 9 plan.

18 The case, the prior case, of course, is the case
19 that the parties are aware of and the City cited in its
20 papers, and that's *In re City of Detroit, Michigan*, reported
21 at 548 Bankruptcy Reporter 748, and in particular the section
22 of that opinion at page 753 to 754 that's labeled Roman
23 numeral II jurisdiction. I incorporate by reference what I
24 said there in that section, in that prior opinion, in this
25 bench opinion that I'm now giving as the basis for why the

1 Court has subject matter jurisdiction over this contested
2 matter and why this contested matter is a core proceeding.

3 That prior opinion I'll just, I'll refer to it as
4 this Court's 2016 opinion. That's the opinion that I just
5 cited.

6 And by the way, that was a decision of this Court
7 from 2016. It's the same opinion that was cited by the U.S.
8 District Court in the *Sanford* case, which the City has
9 attached to its reply brief, and which is reported at 2018
10 Westlaw 6331342, *Sanford versus City of Detroit*, a decision
11 of the U.S. District Court for this District from December 4,
12 2018. Judge Lawson is the district judge in that case.
13 That's the *Sanford* case, and I may refer to that, as well, in
14 this bench opinion.

15 Going back to my published 2016 opinion and
16 decision, however, I do reiterate and incorporate by
17 reference into this bench opinion, everything I said about
18 the applicable law, that is the law applicable to determining
19 whether a given claim or claims arose for bankruptcy purposes
20 before a bankruptcy petition was filed. And that discussion
21 is in the 2016 published opinion at 548 Bankruptcy Reporter
22 at pages 761 through 763.

23 In that part of the 2016 opinion, that's where
24 this Court discusses a couple of concepts that are key to the
25 issue before me on the present motion. And that is, first,

1 the concept and the rule of law, which is that in order to
2 have a pre-petition claim, that is a claim that is deemed to
3 have arisen before the filing of the bankruptcy case. It is
4 not necessary for the claim to have accrued under an
5 applicable non-bankruptcy law such that a lawsuit could be
6 filed on it and sustained in the sense that all the elements
7 of the cause of action had accrued before the bankruptcy
8 petition was filed.

9 At 548 Bankruptcy Reporter, at 762 to 763, I
10 discussed that. It's sometimes referred to as the accrual
11 test for determining when a claim arises. Another name for
12 it sometimes given in the case law is it's sometimes called
13 the, quote, "right to payment," unquote test. As described
14 in my prior opinion, 548 Bankruptcy Reporter, at 762 to 763,
15 that tests provides that a claim arises for bankruptcy
16 purposes only after each element of the claim has been
17 established.

18 It's essentially an accrual test. As I said,
19 however, and reiterate now, but as I said in the 2016
20 opinion, that test had been widely rejected. And this Court
21 rejected it in my 2016 opinion, and I do so now for the same
22 reasons and based on the same authorities that I cited in my
23 prior published opinion from 2016.

24 The second point is that instead of an accrual or
25 right to payment type test, or some other test among possible

1 tests for determining when a claim arises for purposes of --
2 for bankruptcy purposes, the Court adopts -- did adopt, and
3 reiterates now, that the correct test is the so-called fair
4 contemplation test.

5 And as I described it in my prior opinion,
6 including 548 Bankruptcy Reporter at 763, that test looks at,
7 quote: "Looks at whether there was a pre-petition
8 relationship between the debtor and the creditor, such as
9 contract exposure, impact, or privity, such that a possible
10 claim is within the fair contemplation of the creditor at the
11 time the petition is filed," unquote. That's at page 763 of
12 my prior opinion, and I'm omitting citations here on that.

13 I further said, and reiterate now, but I further
14 said in the prior opinion the following: Quote, "Under this
15 test a claim that's considered to have arisen pre-petition if
16 the creditor -- the creditor ascertained through the exercise
17 of reasonable due diligence that it had a claim at the time
18 the petition was filed. This test, which the Court will
19 refer to as the fair contemplation test, has the advantage of
20 allowing the Court to examine all the circumstances
21 surrounding a particular claim, the Debtor's conduct, the
22 party's prepetition relationship, the party's knowledge, the
23 elements of the underlying claim, and use its best judgment
24 to determine what is fair to the parties in context,"
25 unquote. That's 548 Bankruptcy Reporter at 763. And again,

1 I'm omitting citations.

2 Now, in saying this, and in adopting and
3 describing the fair contemplation test, one has to -- the
4 Court bears in mind and reiterates, as I discussed in the
5 prior -- the 2016 opinion, as well, that a claim as defined
6 in the Bankruptcy Code, Section 101, Sub 5, includes a right
7 to payment that is contingent and a right to payment that is
8 unmatured, so that it is possible to have a contingent claim,
9 or an unmatured claim, that still is a claim that has arisen
10 for bankruptcy purposes as of the bankruptcy petition date,
11 even though as of that date the creditor could not have
12 successfully filed suit and prevailed on such a claim under
13 applicable non-bankruptcy law because some event had not yet
14 occurred that had to occur in order for there to be a valid
15 claim that met all the elements under non-bankruptcy law for
16 such a claim.

17 And I discussed that, again, I reiterate what I
18 said in the prior opinion, in particular at pages 548
19 Bankruptcy Reporter, at 761 to 763, about that subject.

20 Now, the Ricks Plaintiffs here, in opposing the
21 City's present motion, have argued, among other things, that
22 under applicable non-bankruptcy law Mr. Ricks, Desmond Ricks,
23 that is, who is the Plaintiff who asserts a claim against the
24 City in Count 1 of the first amended complaint in the U.S.
25 District Court action, did not have any claim that had yet

1 accrued against the City of Detroit when the City of Detroit
2 filed its bankruptcy petition in this Chapter 9 bankruptcy
3 case in July 2013, because as of that time Mr. Ricks'
4 conviction, which he says was a wrongful conviction,
5 essentially was still on the books.

6 It had not been vacated or reversed or in any way
7 successfully challenged as of the date of the bankruptcy
8 petition in this Chapter 9 bankruptcy case, so that he could
9 not at that time, at the time of the bankruptcy petition,
10 have successfully prosecuted a civil claim against the City
11 of Detroit of the type, or types, that are alleged in Count 1
12 of the first amended complaint in the District Court action,
13 so-called *Monell*-type claims against the City.

14 Mr. Ricks argues that that is the applicable non-
15 bankruptcy law, and they, I believe, cite the *Heck* case for
16 that proposition.

17 Now, it develops during -- it develops during,
18 really, the City's reply portion of today's oral argument
19 that the City may now be contending, at least in this Court,
20 that the so-called *Monell* claims that Mr. Ricks is asserting
21 against the City in the District Court action actually
22 accrued much earlier than the date in which Mr. Ricks
23 obtained a vacation, or a reversal, or undoing of some sort,
24 under state law of his conviction, which happened,
25 apparently, in 2017.

1 I will assume for purposes of ruling on the City's
2 motion in this case that Mr. Ricks is correct, his counsel
3 and he are correct, in arguing that he did -- his claim, his
4 *Monell* claims against the City did not accrue under non-
5 bankruptcy law until his conviction was vacated, and that
6 this did not occur until some time in the first half of 2017.

7 So I am assuming for purpose of ruling on the
8 City's present motion, then, that Mr. Ricks did not have any
9 claim, so-called *Monell* claim, against the City of Detroit
10 that had accrued under applicable non-bankruptcy law as of
11 the date the City filed its bankruptcy petition in July 2013.

12 As I indicated, however, that's not the end of the
13 inquiry, because the accrual test, also known as the right to
14 payment test, as I discussed earlier, is not the applicable
15 test to determine when a claim or whether a claim has arisen
16 for bankruptcy purposes.

17 Now, as I further discussed in the 2016 opinion,
18 in detail, and as is true here, if it's undisputed, and it is
19 certainly correct, as the City points out and argues in its
20 motion, that if Mr. Ricks claims that he's asserting in the
21 District Court action against the City of Detroit did, in
22 fact, arise for bankruptcy purposes before the July 2013
23 bankruptcy petition date in this case, then those claims are,
24 in fact, barred by the discharge and by the confirmed plan
25 and by the claims bar date order in this bankruptcy case,

1 which the City cites and quotes from in detail in its opening
2 motion.

3 And so, if Mr. Ricks' claims against the City of
4 Detroit are deemed to have arisen for bankruptcy purposes
5 pre-petition, in other words, before the July 2013 bankruptcy
6 petition date in this case, then those claims are indeed --
7 have indeed been discharged and may not be pursued, and the
8 discharge injunction, and the injunction in the confirmed
9 plan in this case bar Mr. Ricks from pursuing such claims.

10 So back to the fair contemplation test. The City
11 points to 16 different exhibits, numbered exhibits 1 through
12 16, that are attached to its reply brief filed in this case
13 at docket number 13021, all of which I have reviewed and
14 which the City's counsel talked about in today's hearing, but
15 before the hearing, I did review those, as well.

16 And all of those documents, and certainly those
17 documents when taken in combination, do make clear, in my
18 view, that from -- during the time period June of 2009, or
19 roughly -- or rather, some time in 2009, all the way through
20 and as late as October of 2012 -- I'm sorry, all the way
21 through December of 2012, Mr. Ricks, Desmond Ricks, while he
22 was still in prison under the conviction for murder that was
23 later vacated and the charges which were later dismissed in
24 2017, Mr. Ricks, during this time period, this pre-bankruptcy
25 petition time period 2009 through December 2012, had reason

1 to know and to believe, and had knowledge of facts to know
2 and believe, that he had a claim, albeit a then contingent
3 claim, against the City of Detroit.

4 The type of claims that basically for claims that
5 led to his wrongful conviction and wrongful imprisonment for
6 roughly two decades or more, against the City of Detroit.

7 The claims admittedly were still contingent
8 because Mr. Ricks had not yet, as of the bankruptcy petition
9 date, obtained relief or vindication from his murder
10 conviction in State Court, so the claims had not accrued yet.
11 And that event had to occur before he could successfully
12 pursue the claims.

13 So it was a contingent -- they were contingent
14 claims as of the bankruptcy petition date, but he did have
15 reason.

16 And he could have ascertained through the exercise
17 of reasonable due diligence that he had a claim at the time,
18 existing prior to the time of the filing of the bankruptcy
19 petition in this Chapter 9 case, in July 2013.

20 Of course, all of the conduct, the allegedly
21 wrongful conduct that forms the basis of Mr. Ricks' claims
22 against the City, occurred in 1992. As the City correctly
23 points out, Mr. Ricks certainly knew that.

24 And all of the policies and practices of the City
25 that formed the basis of Mr. Ricks' *Monell* claims existed as

1 of March 1992. This is all alleged in the first amended
2 complaint of Mr. Ricks in the District Court.

3 And the exhibits submitted by the City show that
4 Mr. Ricks not only believed, but had reason to believe, that
5 he had a valid claim against the City and the police officers
6 involved in the investigation and prosecution of the murder
7 case against him that led to his conviction in 1992, that he
8 had a valid claim and he was working hard and diligently to,
9 as I think to use the term Plaintiff's -- Mr. Ricks' counsel
10 used in hearing today, to build that case, to build that
11 claim, build evidence for that claim.

12 But it was certainly well within his fair
13 contemplation, based upon the conduct of the Debtor that had
14 occurred back in 1992, the parties, the pre-petition
15 relationship between Mr. Ricks and the City and the City's
16 police personnel involved, and the knowledge that Mr. Ricks
17 had before this bankruptcy case was filed, it was certainly,
18 under all those circumstances, it was, in my view, within the
19 fair contemplation of Mr. Ricks that he had a claim, albeit a
20 contingent claim, against the City of Detroit that existed
21 before the bankruptcy, this bankruptcy case was filed.

22 And so the Court does rule, and in my view is
23 constrained to rule give the very broad scope of the
24 definition of claim under the Bankruptcy Code, as I discussed
25 in the 2016 opinion that I published. and the case law under

1 that definition, the Court is constrained to rule that the
2 claims asserted by Mr. Ricks in his first amended complaint,
3 Count 1 against the City in the District Court case, are pre-
4 petition claims, claims that arose for bankruptcy purposes
5 before the bankruptcy case here was filed.

6 As a result, under the confirmed plan and the
7 applicable law and the orders of this Court, Mr. Ricks'
8 claims against the City were discharged, and Mr. Ricks is
9 enjoined from pursuing or prosecuting any such claims by the
10 Court's orders and by the discharge injunction that applies
11 in this Chapter 9 bankruptcy case.

12 And so for those reasons, the City's motion will
13 be granted. I will enter an order granting that motion now.

14 Mr. Swanson, in looking at the proposed order that
15 was attached to your motion, I guess my first question is:
16 Do you still want the Court to enter the order in the form
17 that was attached to your motion, or do you have any
18 modifications to that proposed order that you want to ask me
19 to make?

20 MR. SWANSON: Your Honor, we would be fine with
21 this order. I think we've learned that two of the three
22 Plaintiffs are not asserting any claims against the City, so
23 --

24 THE COURT: I saw that you said that in your reply
25 brief.

1 MR. SWANSON: Yeah.

2 THE COURT: Does that require any change in the
3 order, though? Or you are saying it doesn't?

4 MR. SWANSON: No, I don't think it does.

5 THE COURT: I don't either.

6 MR. SWANSON: Yeah.

7 THE COURT: Now, what I will -- one thing I do
8 question or have concern about, and that is paragraph number
9 4 of your proposed order.

10 You go beyond -- in the order, you go beyond
11 requiring the Plaintiffs to dismiss the City from the pending
12 District Court action and enjoining them from asserting
13 claims.

14 In paragraph 4, you have the Court ordering that
15 the three Plaintiffs in the Ricks case are prohibited from
16 sharing in any distribution in this bankruptcy case.

17 Now, you said in your motion that none of these
18 parties have filed any proof of claim in the bankruptcy case,
19 timely or otherwise, and that's still true, I assume?

20 MR. SWANSON: Yes.

21 THE COURT: All right. So there's no possible way
22 given that, that they presently would have any argument to
23 share in any distribution of the bankruptcy case. So isn't
24 this paragraph 4 unnecessary?

25 MR. SWANSON: Yes.

1 THE COURT: All right. So take it out. I'll ask
2 you to -- well, here's what I'm going to do in terms of
3 substantive change to the order.

4 Paragraph 2 says, within five days of the entry of
5 this order, the three Ricks parties shall each dismiss, or
6 cause to be dismissed, et cetera, the City from the pending
7 District Court case.

8 The form I want to use is instead of saying five
9 days after order, I want to set a specific calendar date as
10 the deadline for that. And normally, I would say no later
11 than one week from the day, that would be March 27. So
12 that's the date I would pick.

13 Now, just logistically, is that, do you think,
14 going to be a problem for you logistically, Mr. Harrington,
15 for your side to comply if the deadline is March 27th?

16 MR. HARRINGTON: I'm pulling up my calendar, if I
17 may, Your Honor. If that's okay?

18 THE COURT: Sure.

19 MR. HARRINGTON: The 27th is fine.

20 THE COURT: All right. And I think that's
21 actually the date on which summary judgment reply briefs are
22 due in the District Court currently, in any case.

23 All right. So make that change to paragraph 2,
24 Mr. Swanson. It will say no later than March 27, 2019,
25 Desmond Ricks, et cetera, shall each, and so forth. You see

1 that?

2 MR. SWANSON: Yes, Your Honor.

3 THE COURT: All right. And you're taking
4 paragraph 4 out.

5 MR. SWANSON: Yes, Your Honor.

6 THE COURT: The rest of the order is fine. I'll
7 make some non-substantive changes in the first paragraph of
8 the order to recite the fact that the Court held a hearing
9 today, and for reasons stated by the Court on the record, and
10 so forth, that sort of stuff.

11 MR. HARRINGTON: Your Honor?

12 THE COURT: But I'll take care of that.

13 Now, let me -- I'm going to come to you in a
14 minute.

15 MR. HARRINGTON: Yes, Your Honor. Thank you.

16 THE COURT: Mr. Swanson, do you have any questions
17 about the form of the revised order to submit?

18 MR. SWANSON: No, Your Honor. Thank you.

19 THE COURT: All right. Now, Mr. Harrington, same
20 question to you, form of the order.

21 MR. HARRINGTON: Yes, Your Honor. With respect to
22 this case, there are other individual Defendants, the
23 officers involved, that aren't subject to this Court's ruling
24 and do have indemnity from the City of Detroit.

25 My problem with paragraph 3, it talks about

1 Desmond Ricks, Ms. Cobb, Ms. Ricks, are each permanently
2 barred, estopped, and enjoined, from asserting any claims
3 asserted in the --

4 THE COURT: I see what you're getting at.

5 MR. HARRINGTON: So I've got an issue with that.

6 THE COURT: Yeah. How would you change that
7 language to narrow that to make clear that this order is --
8 and certainly, I'm not ruling this way, and we're not -- the
9 order is not -- should not be interpreted to mean that these
10 Ricks parties are enjoined from pursuing their claims against
11 the individuals named in the pending action in their
12 individual capacity rather than in their official capacity.

13 MR. HARRINGTON: Sure. And it's quite simple. I
14 don't think paragraph 3 is necessary at all with a dismissal
15 order against the City. Well, then, it's quite simple. I
16 can't go take City property, but I can pursue through -- I
17 can pursue the officers, and the officers through their
18 bargaining agreement with the City, has indemnity.

19 So I pursue the officers, but then the City of
20 Detroit satisfies any judgment in the event that we prevail
21 against the officers on the claims.

22 THE COURT: Well, if the City indemnifies the
23 officers and ends up paying something in the case because
24 they're indemnified, in the capacity of indemnifying the
25 individual Defendants for claims asserted against them in

1 their individual capacity, then that's a matter -- that's not
2 a matter of right that the Plaintiffs have against the City,
3 the Ricks have against the City. That's, rather, at most, a
4 right that the individuals would have against the City.
5 Right?

6 MR. HARRINGTON: Right. But a broad
7 interpretation of paragraph 3 would affect the substantial
8 rights of my client.

9 THE COURT: Well, let's do this, and you tell me
10 why this doesn't take care of it.

11 I do want to keep an injunction in paragraph 3,
12 but change the wording a bit, and perhaps this. Paragraph 3
13 now instead would say, list the three individuals, and say,
14 each is -- are each permanently, and we don't need barred and
15 estopped, we'll just say permanently enjoined from asserting
16 claims asserted in the lawsuit -- well, or the rest of it.

17 Or claims arising from or related to the lawsuit
18 against the City of Detroit or the property of the City of
19 Detroit. That seems to me narrow enough to not create a
20 problem for you, but perhaps we can add a sentence that makes
21 it absolutely clear.

22 MR. HARRINGTON: I would like that, Your Honor.

23 THE COURT: How would you propose to word a
24 sentence to add to paragraph 3 to do that? What language
25 would you like?

1 MR. HARRINGTON: Why don't we start with, any and
2 all claims made by Plaintiff against the individual officers,
3 David Pauch, Donald Stawiasz, S-T-A-W-I-A-S-Z, and Robert
4 Wilson, are unaffected by this Court's ruling --

5 THE COURT: Hold on. Any and all claims made by?

6 MR. HARRINGTON: Plaintiffs against -- do you need
7 the names of the officers again, Your Honor?

8 THE COURT: I can get the names from the first
9 amended complaint.

10 MR. HARRINGTON: Thank you.

11 THE COURT: Right? It's the three that are listed
12 in the caption of the first amended complaint, right?

13 MR. HARRINGTON: Are unaffected by this Court's
14 ruling.

15 THE COURT: Or how about unaffected by this order?

16 MR. HARRINGTON: By this order.

17 THE COURT: Yes.

18 MR. HARRINGTON: And Plaintiffs may recover any
19 proceeds that would be paid or payable by the City of Detroit
20 through its appropriate collective bargaining agreement, or
21 otherwise indemnity.

22 I mean, it's how it works in all of these 1983
23 cases against the individual officer, because the only claim
24 --

25 THE COURT: Wait a minute. Claims unaffected by

1 this order. I would want to say, any and all claims made by
2 Plaintiffs against the three, and list the three individuals,
3 comma, in their individual capacity, parentheses, as opposed
4 to in their official capacity, are unaffected by this order,
5 period.

6 Now, you want to say more than that, and what's
7 the more than that? Why do we need to say Plaintiffs may
8 recover anything under the collective bargaining?

9 MR. HARRINGTON: The only reason that I say that
10 -- the only reason I feel the necessity to say that, is
11 because of how broad paragraph 3 of that order reads by
12 trying to say that we can't recover any City of Detroit
13 property, because in essence the way that this works and the
14 way that this case will go down the track is if we prevail,
15 or if there's a settlement, or if there's any payment to come
16 from these officers, it gets paid by the City.

17 THE COURT: But not because of -- again, not
18 because the Plaintiffs have any right against the City for
19 that.

20 Any right to indemnity is a right that's enjoyed
21 by the individuals against the City, not a right that the
22 Plaintiffs have against the City. That's the distinction,
23 right?

24 MR. HARRINGTON: Right. Yeah. Because it's the
25 bargaining agreement that the officers have by being a member

1 of the police force. It's like almost an insurance agreement
2 that they're going to pay for, you know, if they're sued --

3 THE COURT: How about this? Add -- the sentence
4 we've been talking about is fine up to the point where they
5 aren't affected by this order.

6 And then add a sentence that says something like
7 this, and we can play with the wording, but something like
8 this. This order does not -- well, what I want to say is
9 this order -- essentially, this order does not impair any
10 right to indemnity that the individual officers may have
11 against the City.

12 MR. HARRINGTON: Fine. Yeah. I'm fine with that.

13 THE COURT: Does that work?

14 MR. HARRINGTON: Something to that extent.

15 THE COURT: Does that work for you, Mr. Swanson?

16 MR. SWANSON: Yes.

17 THE COURT: All right. So let me let me get it
18 down and I'll read it all to you and you guys can make sure
19 it's good.

20 MR. SWANSON: Your Honor?

21 THE COURT: Just a second.

22 MR. SWANSON: Sure.

23 (Pause)

24 THE COURT: All right. So you want to say
25 something before I read it back to you?

1 MR. SWANSON: Yes. Am I responsible for putting
2 this in? I just want to make sure I take careful notes if I
3 have --

4 THE COURT: I'm going to read it now --

5 MR. SWANSON: I will.

6 THE COURT: -- and then you can comment or
7 question. How's that?

8 MR. SWANSON: All right.

9 THE COURT: Both of you.

10 All right. So now paragraph 3 will say, I'll try
11 to go through it. It will say: Desmond Ricks, Akilah Cobb,
12 and Desire'a Ricks, and then after that put a parenthesis and
13 say the, quote, Plaintiffs with a capital P, because we're
14 going to refer to that term later. Okay. Are each
15 permanently enjoined from asserting claims asserted in the
16 lawsuits or claims arising from or related to the lawsuit
17 against the City of Detroit or property of the City of
18 Detroit, period.

19 Then we add this sentence. Any and all claims
20 made by the Plaintiffs against, and then we'll name the three
21 individuals who are named as defendants in the -- individual
22 defendants in the District Court, Pauch, Stawiasz, Wilson,
23 whatever that is, their names, any and all claims made
24 against, and list those three names, A, B, or C, comma, in
25 their individual capacity, parentheses, rather than in their

1 official capacity, close paren, are unaffected by this order,
2 period.

3 Let me make sure you got that much, Mr. Swanson.

4 (Pause)

5 THE COURT: Okay. Then the next sentence will
6 say, it's still on paragraph 3, the next sentence will say,
7 this order does not affect any right to indemnity that the
8 individual officers -- not officers, let's say --

9 MR. HARRINGTON: The City may owe.

10 THE COURT: No. Hold on. In the sentence before
11 when we list the individuals, the three names, let's define
12 them with parentheses, the capital I, Individual --
13 Individuals, put that in quotes, close paren. Okay. So
14 after the three names put paren, the quote capital I,
15 Individuals, close quote and close paren. All right.

16 Then in the next final sentence it'll say, this
17 order does not affect any right to indemnity that the
18 Individuals, capital I, may have against the City, period.

19 So I'll read through it one more time and then
20 I'll ask for any questions or comments.

21 Paragraph 3. Desmond Ricks, Akilah Cobb, and
22 Desire'a Ricks, paren capital P, Plaintiffs, in quotes, close
23 paren, are each permanently enjoined from asserting claims
24 asserted in the lawsuit or claims arising from or related to
25 the lawsuit against the City of Detroit or property of the

1 City of Detroit, period. Any and all claims made by
2 Plaintiffs against, then the three names, A, B, or C, paren,
3 the capital I Individuals, in quotes, close paren, in their
4 individual capacity, paren, as opposed to their official
5 capacity, close paren, are unaffected by this order, period.
6 This order does not affect any right to indemnity that the
7 individuals may have against the City, period. End of
8 paragraph 3.

9 Now, first question. Mr. Swanson, did you get all
10 that down?

11 MR. SWANSON: Yes, Your Honor.

12 THE COURT: The second question is, did you have
13 any comments or questions about form?

14 MR. SWANSON: The only comment that I would have
15 is that the first added sentence we have paren, rather than
16 official capacity, close paren. I would propose to, after
17 that parentheses, define individuals there instead of after
18 their names.

19 THE COURT: That's okay with me. What about you,
20 Mr. Harrington?

21 MR. HARRINGTON: I don't really understand the
22 change. I think we're all talking about the same thing.

23 And just so we're all a hundred percent clear that
24 the spirit of all of this, whether we're saying potato or
25 potato, the spirit of all of this is that in the event that

1 there is a verdict against any one of these officers that any
2 issue of indemnity won't be encumbered or prohibited or
3 precluded in any way, shape, or form by this Court's ruling
4 on the City of Detroit claims. I just want to make sure that
5 that's clear. Right, counsel?

6 THE COURT: So, Mr. Swanson, why do you need this
7 change you've just asked for?

8 MR. SWANSON: I just thought it would -- it would
9 make clear that we're talking about the individuals in their
10 individual capacity and not their official capacity. If the
11 Court prefers, it's like what --

12 THE COURT: Let's leave it as-is.

13 MR. SWANSON: Sure.

14 THE COURT: Anything else?

15 MR. SWANSON: No.

16 THE COURT: What about you, Mr. Harrington?
17 Anything else?

18 MR. HARRINGTON: No, Your Honor.

19 THE COURT: All right. So the order, then, will
20 have the change to paragraph 2 that I mentioned, the new
21 paragraph -- the revised paragraph 3 that we talked about.
22 Paragraph 4 comes out. Paragraph 5 stays in, retaining
23 jurisdiction, that's fine.

24 And I'll ask Mr. Swanson to revise the order,
25 submit it. I'll wait for the presentment of the revised

1 order, since we've discussed it in detail here. And of
2 course before I sign it, I will make sure that it fully
3 complies with my ruling and what we've talked about here, and
4 I'll get that entered.

5 So that's it for today and for this matter. Thank
6 you.

7 MR. HARRINGTON: Thank you, Your Honor.

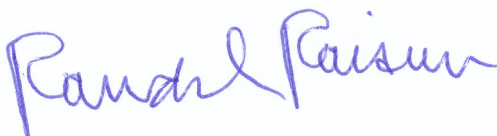
8 THE COURT CLERK: All rise.

9 (Time Noted: 3:41 p.m.)

10 * * * * *

11 CERTIFICATE

12 I, RANDEL RAISON, certify that the foregoing is a
13 correct transcript from the official electronic sound
14 recording of the proceedings in the above-entitled matter, to
15 the best of my ability.

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18 _____ October 24, 2023

19 Randel Raison
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